NO. 89-164

Supreme Court, U.S.
FILED
JUL 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

BO-MICK CONSTRUCTION CO., INC.

Petitioner

v.

MANSEL J. LAFLEUR

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

J. WALTER WARD, JR.
Of
CHRISTOVICH & KEARNEY
Pan American Life Center, Suite 2300
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 561-5700

ATTORNEYS FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

Questions Presented

(1). Did the Supreme Court of the State of Louisiana err in summarily vacating the summary judgment granted by the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana and affirmed by the Louisiana Fourth Circuit Court of Appeal without showing any genuine issue of material fact?

(2). Did the Supreme Court of the State of Louisiana err in failing to apply the United States Court of Appeals for the Fifth Circuit's line of jurisprudence which mandates the grant of summary judgment in this case?

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PETITION FOR
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Bo-Mick Construction Co., Inc., as Cross-Petitioner, hereby petitions this Court to issue a writ of certiorari to review the Orders of the Supreme Court of the State of Louisiana entered on March 27, 1989 and April 21, 1989 in the proceeding entitled "Mansel

J. LaFleur v. P & S Well Service No. 5, Inc. et al", No. 89-C-0425 of the docket of the said Supreme Court of the State of Louisiana.

OPINIONS BELOW

The Orders of the Supreme Court of the State of Louisiana are reproduced in Appendices A and B, commencing at page A-1. No opinion was rendered by the Louisiana Supreme Court. The Findings of Fact and Conclusions of Law by the Court of Appeal, Fourth Circuit, State of Louisiana, are reproduced in Appendix C commencing at page A-5. The Judgment on Motion for Summary Judgment of the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana is reproduced in Appendix D commencing at Page A-15.

JURISDICTIONAL GROUNDS

The orders of the Louisiana Supreme Court, the first granting Mansel J. LaFleur's writ of certiorari and/or review and vacating summary judgment was entered March 27, 1989. Your Petitioner's timely application for rehearing was denied by that same Court on April 21, 1989. This Honorable Court has jurisdiction to review the Order of the Louisiana Supreme Court pursuant to 28 U.S.C.§1257.

STATUTORY PROVISIONS INVOLVED

46 U.S.C. §688, in the portion which is pertinent to the issues presented herein, provides as follows:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury...

33 U.S.C. §§903(a) and 902(3)(g) provide in pertinent part:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States...
>
> ...the term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include...
>
> a master or member of a crew of any vessel...

STATEMENT OF THE CASE

The facts giving rise to the litigation can be summarized briefly. On or about October 7, 1985, plaintiff, Mansel J. LaFleur (hereinafter referred to as

"LaFleur") filed a Petition for Damages against his former employer, Bo-Mick Construction Company, Inc. (hereinafter referred to as "Bo-Mick") and others[1] alleging that he sustained injuries on or about October 10, 1984, while walking from the L/B GEAR ELEVATOR to a fixed platform owned by Gulf Oil Corporation (hereinafter referred to as "Gulf"). LaFleur brought suit pursuant to the Jones Act and the General Maritime Law, alleging he was a seaman and a member of the crew of the L/B GEAR ELEVATOR, a vessel neither owned nor operated by his employer.

At the time of the incident in suit, Bo-Mick was performing fixed platform painting and sandblasting services for Gulf pursuant to an agreement between Bo-Mick and Gulf which required Bo-Mick to perform

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1 Supra note at p.1.

various general oilfield construction and maintenance services on Gulf's fixed platforms.

Additionally, at that time, Bo-Mick had procured certain excess maritime employer liability insurance policies. Said policies, which were effective from April 1984 through April 1985, were subscribed to by Certain Underwriters at Lloyd's, London, represented herein by Robert Murray Collins and John Richard Ludbrooke Youell, and are evidenced by Certificates of Insurance Nos. CSBM 0284 and CSBM 0384. Both excess insurance policies provide coverage only for certain claims by Bo-Mick's own employees under the Jones Act and the General Maritime Law. It is disputed, but not material hereto, whether those certificates provided coverage in respect of the claims of Bo-Mick's employees who were <u>not</u> seamen.

On or about July 30, 1987, Bo-Mick filed a contingent third-party petition against Certain Underwriters at Lloyd's, London alleging these excess maritime employer liability policies provided coverage for its Jones Act and General Maritime Law exposure to LaFleur, for this litigation in the event he was to be found to be a seaman, a fact vigorously denied by Bo-Mick. On or about August 5, 1987, plaintiff filed a First Supplemental and Amended Petition, alleging coverage under these excess maritime employer liability policies for his damage claims and rights of recovery against Petitioners under the Louisiana Direct Action Statute (La.R.S. 22:655).

Shortly after answering said petitions, Petitioner filed a Motion for Summary Judgment on the issue of seaman status. The basis for this Motion was firmly supported by unequivocal testimony by LaFleur that he did not perform any work on the two support vessels which tended the particular Gulf fixed platforms upon which he performed painting and sandblasting. (Depo. of LaFleur, pp. 37, 43, attached hereto as Appendix E at pp. A-18-20). LaFleur was never assigned to either barge nor did he contribute to their functions. Further, Captain Hillery Creel had testified to the fact that LaFleur "never did assist me in nothing". (Depo. of Creel, pp. 53, 57, attached hereto as Appendix F at pp. A-29-31).

Accordingly, on January 15, 1988, the Twenty-Fifth Judicial District Court for

the Parish of Plaquemines, State of Louisiana granted said Motion, finding that LaFleur was not a seaman, and consequently dismissed LaFleur's Jones Act and General Maritime Law claims. However, the lower court specifically reserved unto LaFleur all rights under the Longshoremen's and Harbor Workers' Compensation Act and/or the Louisiana Workers' Compensation Act. This judgment was affirmed on December 13, 1988 by the Louisiana Fourth Circuit Court of Appeal.

On March 27, 1989, the Louisiana Supreme Court summarily vacated the Summary Judgment and on April 21, 1989 summarily denied Petitioner's Application for Rehearing. Petitioner's Motion for Summary Judgment was firmly supported by the uncontroverted record in the trial court and presented no genuine issues of

material fact. Furthermore, the Louisiana Supreme Court's action in vacating Summary Judgment on seaman's status in this case results in a direct conflict with the current position of the United States Court of Appeals for The Fifth Circuit on an important admiralty issue. Accordingly, Petitioner seeks a Writ of Certiorari to review this improper result.

REASONS FOR GRANTING THE WRIT

I. A WRIT SHOULD BE ISSUED TO DETERMINE WHETHER THE SUPREME COURT OF LOUISIANA ERRED IN SUMMARILY VACATING SUMMARY JUDGMENT ON THE ISSUE OF SEAMAN'S STATUS IN A CASE WHICH PRESENTED NO GENUINE ISSUES OF MATERIAL FACT.

A court may decide that seaman's status is lacking as a matter of law. Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986); White v. Valley Line Co., 736 F.2d 304, 305 (5th Cir. 1984); Wallace v. Oceaneering Intl., 727

F.2d 427, 432 (5th Cir. 1984); Dove v. Belcher Oil Company, 686 F.2d 329, 334 (5th Cir. 1982). As the U.S. Fifth Circuit noted in Barrett, seaman's status may be determined by summary judgment in the appropriate situation:

> Thus, we have held that where the facts establish beyond question as a matter of law the lack of seaman status . . . a court . . . may, in the proper case, hold that there is no reasonable evidentiary basis to support a jury finding that the injured person is a seaman . . . under the Jones Act.

Barrett, 781 F.2d at 1074 (citing Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir. 1981), cert. denied 454 U.S. 818 (1981)).

In Fayard v. Contifleeting Inc., 511 So.2d 3,4 (La. App. 4th Cir.), writ denied, 514 So.2d 461 (La. 1987), the Louisiana Fourth Circuit Court of Appeal noted:

> While summary judgment on seaman status in Jones Act cases is rarely

> proper, and even in marginal cases should go to the jury, it is in some circumstances possible to rule as a matter of law that a worker is not a seaman, Bouvier v. Krenz, 702 F.2d 89, at 90 (5th Cir. 1983), and the cases cited therein; cf. Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), where the appeals court affirmed the district court's decision on the issue as a matter of law in rendering a judgment notwithstanding the verdict.

The classic test to determine whether a worker has offered evidence sufficient to warrant a jury verdict that he is a seaman was set forth in Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). Judge Wisdom articulated the now traditional test for seaman status as follows:

1. The injured worker must have been "assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel," and

2. The work he performed must have "contributed to the function of the vessel or to the accomplishment of its mission,

> or to the operation or welfare of the vessel in terms of its maintenance." (emphasis added)

This test has been qualified by the U.S. Fifth Circuit time and time again. The term "vessels" has been expanded to include an identifiable fleet of vessels in additional to a single vessel, but the relationship between the injured worker and an identifiable vessel or group of vessels must be "substantial in point and time and not merely spasmodic." Ward v. Reeled Tubing, Inc., 637 F. Supp. 33, 35 (E.D. La. 1986), aff'd, 811 F.2d 600 (5th Cir. 1987); Bertrand v. Intl. Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983). The permanency requirement mandates that "a claimant must have more than a transitory connection with the vessel or a specific group of vessels." Barrett, supra (citing Ardoin v. J. Ray McDermott Co., 641 F.2d

277, 288 (5th Cir. 1981)). Additionally, it must be proven that the injured worker performed a significant part of his work aboard the vessel, with "at least some degree of regularity and continuity." Keener v. Transworld Drilling, Co, 468 F.2d 729, 732 (5th Cir. 1972). See, e.g. Barrios v. Engine & Gas Compressor Services, Inc., 669 F.2d 350, 353 (5th Cir. 1982); Holland v. Allied Structural Steel Co., 539 F.2d 476, 484 (5th Cir. 1976). The U.S. Fifth Circuit, sitting en banc, has also held that unless a worker's "permanent job assignment" changed before the injury, the relevant time period for assessing his status as a seaman is the entire course of his employment with his current employer. Barrett, 781 F.2d at 1076-77.

Application of this test to the uncontroverted facts of this case illustrates there are no genuine issues as to any material facts and that Petitioner was entitled to Judgment as a matter of law, as was initially decided by the lower court and affirmed by the appellate court. First, LaFleur was never assigned permanently to an identifiable vessel or group of vessels. LaFleur admits that the two vessels with which he had any connection only transported him to his jobsite (on fixed platforms) and carried his equipment. (Depo. of LaFleur, pp. 43, 45, 47, attached hereto as Appendix E at pp. A-19-23). Secondly, LaFleur did not perform any of his work on the vessel, much less a substantial part of his work. In fact, LaFleur has admitted that the actual sandblasting and painting took place on the

fixed platforms. (Depo. of LaFleur, p. 43, attached hereto as Appendix E at pp. A-19-21). Lastly, the record is abundant with evidence that LaFleur never contributed to the function of the vessel in terms of its maintenance, operation and welfare. (Depo. of LaFleur, p. 43, attached hereto as Appendix E at pp. A-19-21; Depo. of Creel, attached hereto as Appendix F at p. A-26). Accordingly, Petitioner asserts the question of seaman's status in this case should have been resolved by summary judgment, and the Louisiana Supreme Court erred in summarily vacating the summary judgment since there are no genuine issues of material fact.

II. A WRIT SHOULD BE ISSUED TO DETERMINE WHETHER THE SUPREME COURT OF LOUISIANA ERRED IN SUMMARILY VACATING SUMMARY JUDGMENT ON THE ISSUE OF JONES ACT SEAMAN'S STATUS WHERE SUCH A RULING IS IN DIRECT CONFLICT WITH THE CURRENT POSITION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

It is incumbent upon the Louisiana Supreme Court to follow substantive law as developed in federal cases with respect to cases filed pursuant to 46 U.S.C. §688. Macomber v. De Bardeleben Coal Co., Inc., 8 So.2d 624 (La. 1942), cert. denied 317 U.S. 661 (1942).[2]

Three recent decisions by the United States Court of Appeals for the Fifth

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2 See also Wright v. Ocean Drilling & Exploration Company, 444 So.2d 129, 134-35 (La. App. 4th Cir. 1983); Barboza v. Texaco, Inc., 434 F.2d 121 (1st Cir. 1970); Dixon v. Serodino, Inc., 331 F.2d 668 (6th Cir. 1964); cf. Urie v. Thompson, 337 U.S. 163, 174 (1949).

Circuit[3] conclusively support the proposition that persons whose work activities are in large part performed on fixed platforms do not enjoy seaman's status just because they may have been incidentally involved with a tender vessel which provided support services to the platform. In other words, offshore workers in these settings are deemed to be "permanently assigned" to the fixed platform on which they are working, rather than to the tender vessel with which the prospective claimant may have had incidental contact.

Further, a very recent decision of the United States Court of Appeals for the

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3 See, Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980); Golden v. Rowan Companies, Inc., 778 F.2d 1022 (5th Cir. 1985); and Miller v. Rowan Companies, Inc., 815 F.2d 1021 (5th Cir. 1987).

Fifth Circuit mandates the grant of summary judgment in this case.

In Chauvin v. Sanford Offshore Salvage, Inc., 868 F.2d 735 (5th Cir. 1989), Sanford employed the plaintiff as a member of its regular work crew. The plaintiff was generally assigned to Sanford's barge, the SEA SALVOR, and when the SEA SALVOR performed offshore salvage work, he was assigned to that vessel. These assignments were sporadic and unpredictable in both frequency and length. During the gaps between assignments, the plaintiff worked in Sanford's salvage yard and assisted in the repair of the SEA SALVOR. At the time of his accident, the plaintiff was working on the SOUTHERN NO. 6., a barge chartered by Sanford from Southern Shipbuilding Corporation for the purpose of lifting equipment which exceeded

the SEA SALVOR's capacity. On the morning of the accident, the plaintiff had been ordered to assist in transporting equipment from Sanford's yard to the dock and to assist the crew of the SOUTHERN NUMBER 6. While assisting in the rigging of a spreader bar to the crane of the barge, the plaintiff was injured when a pin from a loading sling, weighing approximately 120 lbs., fell onto his foot.

The plaintiff sued his employer, Sanford Offshore, for its negligence, alleging he was a seaman under the Jones Act, and Southern Shipbuilding, the owner of the barge chartered by Sanford, alleging unseaworthiness under the General Maritime Law or negligence under §905(b) of the LHWCA. The district court found that the plaintiff was not a seaman and dismissed the case as against Sanford and its Excess

MEL underwriters, because under the LHWCA, the employer could not have liability to its employee except for compensation and medical. The Fifth Circuit affirmed, relying on its prior decision in Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977, 983 (5th Cir. 1987), cert. denied, ____U.S. _____, 108 S.Ct. 1013, 98 L.Ed. 2d 978 (1988), which clarified the standard for determining whether a plaintiff should be characterized as a Jones Act seaman or a LHWCA longshoreman. The court concluded:

> Although we have on occasion analyzed the question of whether an employee engaged in longshoring or ship repairing was a member of the crew of a vessel under the Robison test, we are persuaded that such an analysis is unnecessary if the employee is engaged in an occupation expressly enumerated in the (LHWCA). Because workmen engaged in certain enumerated occupations are explicitly covered by the LHWCA if they meet the Act s situs requirement, ...these workers were ineligible for consideration as seaman or members of the crew of a vessel entitled to

> Jones Act benefits. Chauvin, supra, at 739, (Emphasis added).

Based on the LHWCA and Pizzitolo, the District Court found, and the Fifth Circuit affirmed, that the plaintiff's activities at the time of his injury as well as his general employment background (loading and unloading cargo and onshore vessel repair) fell within the ambit of the LHWCA, inasmuch as he was engaged in occupations enumerated in the LHWCA. Accordingly, the Fifth Circuit affirmed that Chauvin was not a seaman under the Jones Act.

In Howard v. Rebel Well Service, 632 F.2d 1348 (5th Cir. 1980), the United States Fifth Circuit held that a plaintiff who was employed as a painter and sandblaster at a yard where his employer performed minor repairs on navigable floating barges and who spent approximately ten percent of his time

painting/sandblasting equipment from barge rigs was engaged in maritime employment and met the status requirement of the LHWCA.

The record of the trial court clearly shows that LaFleur was not assigned to any vessels; rather, he was assigned to the fixed platforms upon which he performed his painting and sandblasting work. In his deposition, LaFleur testified that he does not remember ever working off of the barges. (Depo. of LaFleur, p. 43, attached hereto as Appendix E at pp. A-54-55). Additionally, Captain Hillery Creel testified that it was his exclusive duty to navigate and maintain the L/B GEAR ELEVATOR and that LaFleur never assisted him in any of his work. (Depo. of Creel, p. 53, attached hereto as Appendix F, pp. A-64-65). The totality of the record in conjunction with the jurisprudence

indicates that LaFleur was not permanently assigned to any vessel or fleet of vessels nor was he a member of the crew. Rather, he was assigned to the fixed platforms upon which he performed his painting and sandblasting duties. Fixed platforms are treated as artificial islands and, as such, are not vessels. Workers assigned to such platforms therefore do not qualify for seaman status. Bertrand v. Shell Oil Co., 489 F.2d 293, 295 (5th Cir. 1974), Bertrand v. Forest Oil Co., 441 F.2d 809, 811 (5th Cir.), cert. denied, 404 U.S. 863 (1971).

Thus, pursuant to the aforementioned controlling jurisprudence, it is clear that LaFleur is not a Jones Act seaman, but rather a longshoreman or a state worker.

The undisputed central facts are supported by the deposition testimony of LaFleur's co-worker, Donald Michael Dean. See Appendix-G.

CONCLUSION

Petitioner respectfully requests this Honorable Court to grant its Petition for Writ of Certiorari and to order the Louisiana Supreme Court to reverse its prior ruling based on the fact that there is no genuine issue of material fact as to LaFleur's seaman status and the ruling of the Louisiana Supreme Court directly conflicts with the United States Court of Appeals for the Fifth Circuit's current line of jurisprudence on this important Jones Act issue, or alternatively grant a full hearing on the issues presented to it.

Respectfully submitted,

J. WALTER WARD, JR.
CHRISTOVICH & KEARNEY
Pan American Life Center, Suite 2300
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 561-5700
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 1989, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to each of the following:

Rufus C. Harris, III, Esq.
Terriberry, Carroll & Yancey
Suite 3100, Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
Telephone: (504) 523-6451
Attorneys for P&S Well Service No. 5, Inc.

Kenny M. Charbonnet, Esq.
111 Veterans Boulevard, Suite 740
Metairie, Louisiana 70005
Telephone: (504) 837-1844
Attorney for Liberty Mutual Insurance Company

Robert C. McCall, Esq.
Baggett, McCall & Burgess
3006 Country Club Road
P. O. Drawer 7820
Lake Charles, Louisiana 70606
Attorneys for Mansel J. LaFleur

Winston Edward Rice, Esq.
Rice, Fowler, Kingsmill, Vance & Flint
Poydras Center, Suite 2600
650 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 523-2600
Attorneys for Robert Murray Collins and John Richard Ludbrooke Youell, as Representatives of Certain Underwriters at Lloyd's London, et al

I further certify that all parties required to be served have been served.

J. WALTER WARD, JR.
CHRISTOVICH & KEARNEY
2300 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 561-5700